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No.

Supreme Court, U.S.
FILED
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In the Supreme Court of the United States

OCTOBER TERM, 1998

IMMIGRATION AND NATURALIZATION SERVICE AND ROSANNE SONCHIK, DISTRICT DIRECTOR, PETITIONERS

v.

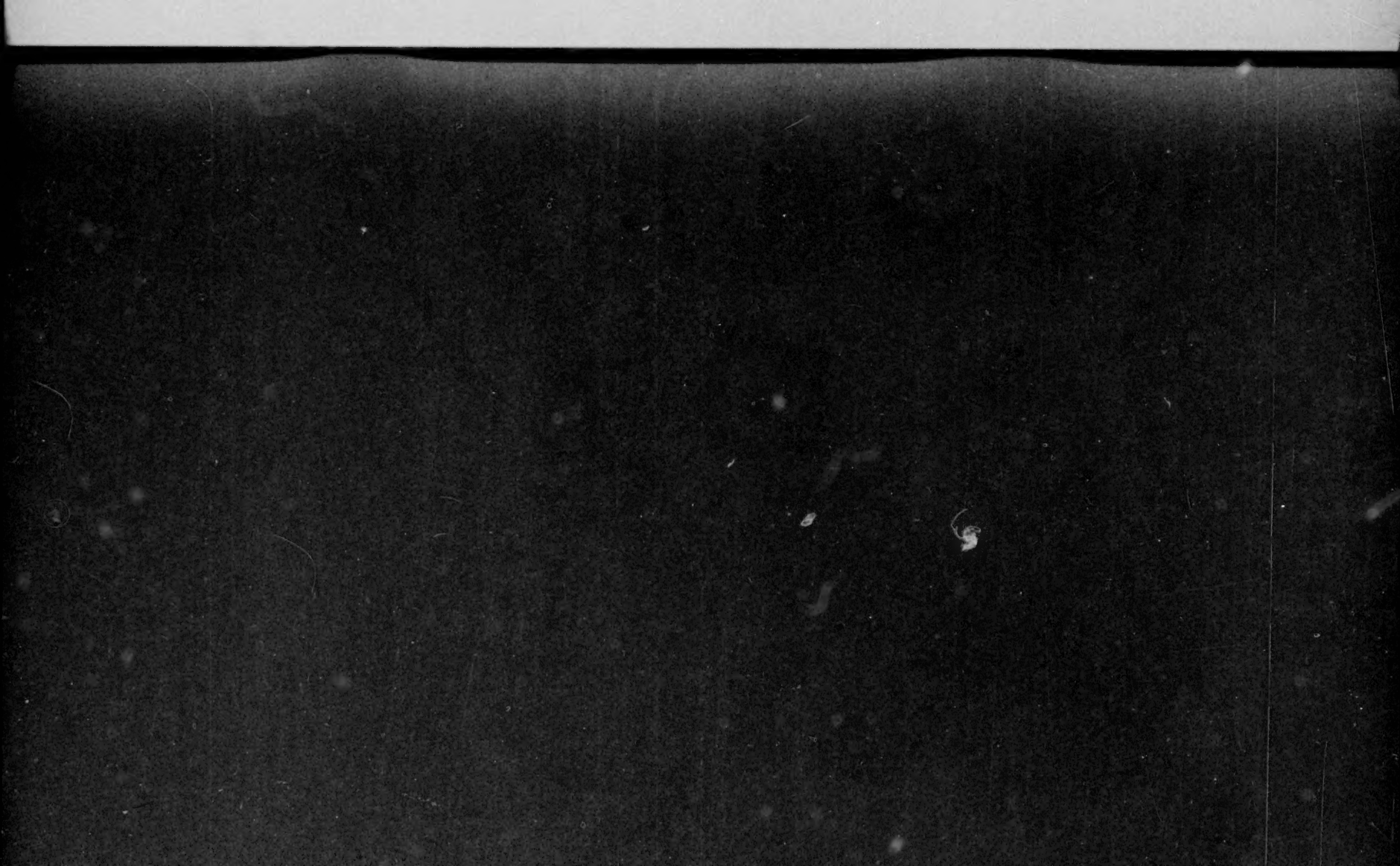
DANIEL MAGANA-PIZANO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent, an alien found deportable because of his criminal conviction, applied for discretionary relief from deportation under 8 U.S.C. 1182(c) (1994). The Board of Immigration Appeals (BIA), following an earlier decision of the Attorney General, concluded that he was statutorily ineligible for such relief under amendments to Section 1182(c) made by Section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Respondent raised both constitutional and non-constitutional challenges to the BIA's determination by petitioning for review of his deportation order in the court of appeals, and also by petitioning for a writ of habeas corpus in the district court. The court of appeals concluded that Section 309(c)(4)(G) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) deprived it of jurisdiction over respondent's claims, and also concluded that 8 U.S.C. 1252(g) (Supp. II 1996) divested the district court of jurisdiction. The court of appeals further concluded that Section 1252(g) violated the Suspension of Habeas Corpus Clause, U.S. Const. Art. I, § 9, Cl. 2, insofar as it deprived respondent of a judicial forum, and that he should be permitted to proceed in district court under the general federal habeas corpus statute, 28 U.S.C. 2241.

The questions presented are:

1. Whether the court of appeals had jurisdiction to entertain either (i) respondent's challenge to the Attorney General's decision that he is statutorily ineligible for discretionary relief from deportation under 8 U.S.C. 1182(c), or (ii) his constitutional challenge to that provision of the Immigration and Nationality Act.

2. Whether Section 440(a) of AEDPA, Section 309(c)(4)(G) of IIRIRA, and 8 U.S.C. 1252(g) (Supp. II 1996), violate the Suspension of Habeas Corpus Clause of the Constitution.

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v.

DANIEL MAGANA-PIZANO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Immigration and Naturalization Service (INS) and Rosanne Sonchik, District Director of the INS, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The initial opinion of the court of appeals (App. 25a-47a)[1] is reported at 152 F.3d 1213. An order amending that opinion and the amended opinion reflecting that order (App. 1a-24a) have not yet been reported. The judgment and docket entry of the district court (App. 48a-49a) are unreported, as are the decision and order of the immigration judge (App. 50a-52a) and the

[1] "App." refers to the separately bound appendix to this petition.

decision of the Board of Immigration Appeals (App. 53a-54a).

JURISDICTION

The judgment of the court of appeals was entered on September 1, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Reprinted in an appendix to this petition (App. 55a-64a) are pertinent portions of the Suspension of Habeas Corpus Clause of the Constitution, Art. I, § 9, Cl. 2; 8 U.S.C. 1105a(a) and 1182(c) (1994), as in effect before and after April 24, 1996; 8 U.S.C. 1252(a) and (g) (Supp. II 1996); Sections 401(e), 440(a), and 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1268, 1276, 1277; Sections 304, 306, and 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-587, 3009-607, 3009-625; and 28 U.S.C. 2241.

STATEMENT

1. This case presents questions about the application and the constitutionality of several major changes to the Nation's immigration laws enacted by Congress in 1996. Those changes were designed in large part to reduce the opportunities for criminal aliens to obtain administrative relief from deportation, and to facilitate their removal from the United States by streamlining and channeling judicial review of their deportation orders. Two enactments by Congress are particularly pertinent: the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214; and the Illegal Immigration Reform and

Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546.

a. Before the enactment of AEDPA, an alien lawfully admitted for permanent residence who was subject to deportation because of a criminal conviction could (like other permanent resident aliens) apply to the Attorney General for discretionary relief from deportation under 8 U.S.C. 1182(c) (1994). To be eligible for such relief, the alien had to show that he had had a lawful unrelinquished domicile in this country for seven years, and that, if his conviction was for an "aggravated felony," as defined in the Immigration and Nationality Act (INA) at 8 U.S.C. 1101(a)(43) (1994), he had not served a term of imprisonment for that conviction of five years or longer. See 8 U.S.C. 1182(c) (1994).[2] If the Attorney General, in the exercise of her discretion, denied relief, then the alien could challenge that denial by filing a petition for review of his deportation order in the court of appeals. See 8 U.S.C. 1105a(a) (1994) (repealed 1996) (incorporating Hobbs Administrative Orders Review Act, 28 U.S.C. 2341-2351). Under certain circumstances, an alien in custody pursuant to an order of deportation could also seek judicial review thereof by filing a petition for a writ of habeas corpus,

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[2] Although Section 1182(c) by its terms allowed the Attorney General to admit permanent resident aliens who had temporarily proceeded abroad and were returning to their domicile in the United States, it had long been interpreted (in response to the Second Circuit's decision in *Francis* v. *INS*, 532 F.2d 268 (1976)) also to permit the Attorney General to waive the grounds for deportation of lawfully admitted permanent resident aliens who were present in the United States and in deportation proceedings. See *In re Silva*, 16 I.& N. Dec. 26 (BIA 1976); *Gonzalez* v. *INS*, 996 F.2d 804, 806 (6th Cir. 1993); *Ashby* v. *INS*, 961 F.2d 555, 557 & n.2 (5th Cir. 1992); *Tapia-Acuna* v. *INS*, 640 F.2d 223 (9th Cir. 1981).

pursuant to 8 U.S.C. 1105a(a)(10) (1994) (repealed 1996).

b. In 1996, Congress twice restricted both the substantive eligibility of criminal aliens for discretionary relief from deportation and the availability of judicial review of criminal aliens' deportation orders.

i. On April 24, 1996, Congress enacted AEDPA. Section 440(d) of AEDPA, 110 Stat. 1277, amended Section 1182(c) to make certain classes of criminal aliens categorically ineligible for discretionary relief under that Section—including aliens who were deportable because they had been convicted of a controlled substance offense, see 8 U.S.C. 1251(a)(2)(B) (1994). At the same time, AEDPA repealed 8 U.S.C. 1105a(a)(10) (1994), which had permitted aliens in custody pursuant to an order of deportation to obtain judicial review in habeas corpus proceedings, and replaced it with an express *prohibition* of judicial review of deportation orders for aliens who are deportable by reason of having committed certain criminal offenses. AEDPA §§ 401(e), 440(a), 110 Stat. 1268, 1276-1277. Thus, since the enactment of AEDPA, 8 U.S.C. 1105a(a)(10) (1994) has provided that any final order of deportation against an alien who is deportable for having committed one of the disqualifying offenses "shall not be subject to review by any court." 110 Stat. 1276-1277.

ii. On September 30, 1996, Congress enacted IIRIRA, which comprehensively amended the INA. IIRIRA repealed 8 U.S.C. 1182(c) (1994) on a prospective basis, and replaced it with another form of discretionary relief, known as "cancellation of removal." See IIRIRA § 304(b), 110 Stat. 3009-597; 8 U.S.C. 1229b (Supp. II 1996). Certain classes of criminal aliens were made illegible for cancellation of removal. See 8 U.S.C. 1229b(a)(3) and (b)(1)(c) (Supp. II 1996). The can-

cellation of removal provisions, however, were made applicable only to aliens who are placed in removal proceedings on or after April 1, 1997, and therefore do not govern this case. See IIRIRA § 309(a) and (c)(1), 110 Stat. 3009-625. IIRIRA retained 8 U.S.C. 1182(c) (1994) for cases commenced prior to April 1, 1997, including this one; and for those same cases it also retained Section 440(d) of AEDPA, which (as explained above) made certain classes of criminal aliens ineligible for relief under Section 1182(c).

IIRIRA also replaced the INA's judicial review provision in 8 U.S.C. 1105a (1994) with a new 8 U.S.C. 1252 (Supp. II 1996), again for cases in which the administrative proceedings were commenced on or after April 1, 1997. See IIRIRA § 309(c)(1), 110 Stat. 3009-625. The new Section 1252 provides for judicial review of *all* final removal orders in the courts of appeals pursuant to the Hobbs Act, 28 U.S.C. 2341-2351.[3] 8 U.S.C. 1252(a)(1) (Supp. II 1996). Section 1252 also carries forward the preclusion of review in 8 U.S.C. 1105a(a)(10) (1994) (as amended by AEDPA Section 440(a)) by providing that "no court shall have jurisdiction to review any final order of removal against an alien who is removable for having committed" a crime within one of several classes of criminal offenses. 8 U.S.C. 1252(a)(2)(C) (Supp. II 1996). The new Section 1252 further provides, in a paragraph entitled "CONSOLIDATION OF QUESTIONS FOR JUDICIAL REVIEW," that "[j]udicial review of all questions of law and fact, including interpretation and application of

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[3] Congress also provided that, nothwithstanding subsection (b) of 8 U.S.C. 1105a (1994), judicial review of final orders of *exclusion* during the transition period would be in the court of appeals, not in the district court in habeas corpus proceedings. See IIRIRA § 309(c)(4)(A), 110 Stat. 3009-626.

constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this title shall be available only in judicial review of a final order under this section," 8 U.S.C. 1252(b)(9) (Supp. II 1996)—*i.e.*, only in the court of appeals, as provided in Section 1252(a)(1).

Cases (such as this one) in which the administrative proceedings were begun prior to April 1, 1997, continue to be governed by 8 U.S.C. 1105a (1994), as amended by AEDPA. IIRIRA § 309(c)(2), 110 Stat. 3009-625. Even for such cases, however, Congress enacted special rules for any such cases in which the final deportation order is entered on or after October 30, 1996. One of those special rules, in Section 309(c)(4)(G) of IIRIRA, reinforces the preclusion of judicial review in 8 U.S.C. 1105a(a)(10) by providing that "there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed [specified criminal offenses]." 110 Stat. 3009-626 to 3009-627.

Finally, in IIRIRA, Congress enacted a sweeping jurisdiction-limiting provision, 8 U.S.C. 1252(g) (Supp. II 1996), which provides:

> Except as specifically provided in [8 U.S.C. 1252] and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under [the INA].

The new Section 1252(g) is expressly made applicable "without limitation to all claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under [the INA]." IIRIRA § 306(c)(1), 110

Stat. 3009-612 (as amended by Pub. L. No. 104-302, § 2(1), 110 Stat. 3657).

b. After the enactment of these major immigration laws, two important questions arose in immigration proceedings about the scope of Section 440(d) of AEDPA, which bars certain criminal aliens from Section 1182(c) relief. Like many other aliens in deportation proceedings affected by AEDPA and IIRIRA, respondent challenges his deportation order by seeking to litigate both of these questions. The instant case concerns whether either of those challenges may be brought, and if so in what court.

i. First, the question arose as to whether Section 440(d) applies to aliens who had been convicted or placed in deportation proceedings before the enactment of AEDPA. On June 27, 1996, a closely divided Board of Immigration Appeals (BIA) initially decided that Section 440(d) does apply to deportation proceedings that had already been initiated, but that it should not be applied to aliens who had filed applications for Section 1182(c) relief in those proceedings before AEDPA's enactment. *In re Soriano*, Int. Dec. No. 3289 (App. 65a-97a). On September 12, 1996 (before IIRIRA was enacted), the Attorney General, exercising her authority under 8 C.F.R. 3.1(h), vacated the opinion of the BIA in *Soriano* and certified for her decision the question whether Section 440(d) applies to applications filed as of the date of its enactment.[4] App. 98a.

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[4] Also on September 12, 1996, the Solicitor General filed a supplemental brief in this Court in *INS* v. *Elramly*, No. 95-939, addressing the temporal scope of Section 440(d). In that brief, we argued (at 15-18) that Section 440(d) had divested the Attorney General of authority to grant Section 1182(c) relief in pending cases. On September 16, 1996, the Court remanded *Elramly* to the

On February 21, 1997, the Attorney General concluded in *Soriano* that AEDPA Section 440(d) applies to all deportation proceedings pending on the date of enactment, including those in which aliens had already submitted applications for Section 1182(c) relief. App. 99a-112a. Following the analytical framework set forth by this Court in *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), the Attorney General concluded that application of Section 440(d) to pending deportation cases is not retroactive because it does not "impair a right, increase a liability, or impose new duties on criminal aliens. The consequences of [r]espondent's conduct remain the same before and after the passage of AEDPA: criminal sanctions and deportation." App. 105a-106a. The Attorney General further concluded that Section 440(d) "is best understood as Congress's withdrawal of the Attorney General's authority to grant prospective relief. Thus, the statute alters both jurisdiction and the availability of future relief, and should be applied to pending applications for relief." App. 106a.

ii. Second, the question arose whether Section 440(d) of AEDPA bars the Attorney General from granting Section 1182(c) relief to criminal aliens who temporarily proceeded abroad and are seeking admission to the United States, as well as to criminal aliens in the United States who are in deportation proceedings. The BIA concluded in *In re Fuentes-Campos*, Int. Dec. 3318 (May 14, 1997), and *In re Gonzalez-Camarillo*, Int. Dec. 3320 (June 19, 1997), that Section 440(d) bars relief only for criminal aliens in deportation proceedings.

2. Respondent is a native and citizen of Mexico who entered the United States as the child of a lawful

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court of appeals for further consideration in light of AEDPA. *INS* v. *Elramly*, 518 U.S. 1051 (1996).

permanent resident in 1977. In February 1995, he was convicted in California state court of the offense of being under the influence of a controlled substance. App. 3a. That controlled substance offense rendered him deportable under 8 U.S.C. 1251(a)(2)(B)(i) (1994) (now recodified at 8 U.S.C. 1227(a)(2)(B)(i) (Supp. II 1996)).

On May 17, 1996, after the enactment of AEDPA, the INS issued an Order to Show Cause against respondent, commencing his deportation proceeding. Respondent conceded his deportability and applied to the immigration judge (IJ) for discretionary relief under Section 1182(c). On October 4, 1996, the IJ ruled that, by virtue of Section 440(d) of AEDPA, respondent was ineligible for discretionary relief under Section 1182(c). The IJ concluded that the amendment made to Section 1182(c) by AEDPA Section 440(d) applies to any application for such relief that was not administratively final as of AEDPA's enactment. App. 51a-52a. On March 14, 1997, the BIA dismissed respondent's appeal, relying upon the Attorney General's decision in *Soriano*. App. 53a-54a.

3. On March 26, 1997, respondent filed a petition for a writ of habeas corpus in the United States District Court for the District of Arizona. He contended that Section 440(d) violates constitutional equal-protection principles insofar as it is applied to bar the Attorney General from granting Section 1182(c) relief to aliens in deportation proceedings, but not to those returning from a temporary trip abroad.[5] On April 7, 1997, the

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[5] The habeas corpus petition did not raise the claim that application of AEDPA Section 440(d) to respondent's case would be impermissibly retroactive. At the hearing on his motion for a temporary restraining order, respondent sought leave to amend his complaint to include such a claim. See 4/7/97 Tr. 13.

district court dismissed respondent's petition for lack of jurisdiction, concluding that any challenge to his deportation order had to be presented to the court of appeals. App. 48a-49a; 4/7/97 Tr. 27-28.

4. Respondent appealed to the court of appeals from the dismissal of his habeas corpus petition, and also filed directly in the court of appeals a petition for review of the BIA's decision, pursuant to 8 U.S.C. 1105a (1994). In the court of appeals, he renewed the equal-protection challenge to Section 440(d), and also argued that application of Section 440(d) to his case would be impermissibly retroactive. The court of appeals consolidated the two cases. It dismissed the petition for review for lack of jurisdiction, and it reversed the dismissal of the habeas corpus petition and remanded that case to the district court for further proceedings on the merits. App. 1a-24a.

a. As to the petition for review, the court concluded that its jurisdiction had been ousted by Section 309(c)(4)(G) of IIRIRA. App. 6a-8a. The court noted that, although Section 309(c)(4)(G) states that "there shall be no appeal" in the case of an alien deportable because of criminal convictions like respondent's, the government had conceded that the court of appeals retained jurisdiction to review the Attorney General's determination that the petitioner is in fact an alien, and that the alien's criminal offense is among the statutorily enumerated ones ousting judicial review. App. 7a. But because respondent's contentions—including his challenge to the constitutionality of the amendment to Section 1182(c)—were not within that limited class of claims, the court concluded that they were not within the scope of its jurisdiction on direct appeal from the BIA's decision. App. 8a. The court did not address whether Section 309(c)(4)(G) of IIRIRA should be

construed to permit his constitutional challenge to a provision of the INA itself to be raised in a petition for review to the court of appeals.

b. As to the petition for a writ of habeas corpus, the court of appeals ruled that the district court had jurisdiction over respondent's claims under the general federal habeas corpus statute, 28 U.S.C. 2241. App. 9a. In reaching that result, the court held that Section 1252(g), which generally precludes district court jurisdiction over challenges to deportation orders, is unconstitutional as applied to cases like this one, where (in the court's view) the alien would otherwise have no opportunity for judicial review of his challenges in either the court of appeals or the district court. App. 18a-19a.

In concluding that, without Section 2241, respondent would have no judicial forum for any of his claims, the court relied on its earlier decision in *Hose* v. *INS*, 141 F.3d 932 (9th Cir. 1998) (petition for rehearing pending). In *Hose*, an alien ordered excluded from the United States for lack of a valid visa filed a petition for a writ of habeas corpus in district court, instead of a petition for review in the court of appeals. *Id.* at 933-934. The court of appeals ruled in *Hose* that, in Section 1252(g), Congress had withdrawn the district court's jurisdiction to hear the case—notwithstanding that Hose had attempted to invoke the court's habeas corpus jurisdiction under Section 2241—and that Hose's sole avenue for judicial review was by petition for review filed directly in the court of appeals. *Id.* at 935-936. The *Hose* panel also rejected the contention that the result in that case violated the Suspension of Habeas Corpus Clause, Art. I, § 9, Cl. 2, because, it stated, "Congress has not attempted to preclude all federal court review of orders to exclude or remove

aliens. Rather it has provided a streamlined approach for consideration by the courts of appeals of claims arising from those orders and the procedures leading to them." *Id.* at 936.

The panel in this case stated that respondent's habeas petition "arises under polar opposite conditions" from those in *Hose*, because (it believed) respondent had raised colorable constitutional claims but had no judicial avenue, save habeas corpus, in which to present them: Section 309(c)(4)(G) of IIRIRA, it concluded, closes the court of appeals, and Section 1252(g) closes the district court. App. 11a. "In short, if we apply [Section 1252(g)] as construed by *Hose* to [respondent], he has no means of judicial review." *Ibid.* (footnote omitted).

The court then considered whether that result would violate the Suspension of Habeas Corpus Clause. After reviewing the history of habeas corpus in the immigration context (App. 13a-17a),[6] the court concluded that

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[6] The court noted that the "traditional Great Writ was largely a remedy against executive detention." App. 12a (citation omitted). It observed that, after passage of the Chinese Exclusion Act of 1882, which forbade the immigration of certain Chinese laborers for ten years, some Chinese nationals contested their deportation under the Act on the ground that they were already residents of this country or otherwise outside the Act's reach; the courts concluded that they had jurisdiction by habeas corpus to test the legality of the executive's efforts to deport or exclude the Chinese under the Exclusion Act. App. 13a-14a. Further, the court observed, although this Court had held that Congress, in the Immigration Act of 1917, had precluded all judicial review of discretionary deportation decisions by executive authorities, and that such preclusion was constitutional, the Court had also reaffirmed, in *Heikkila* v. *Barber*, 345 U.S. 229, 234-235 (1953), that an alien might test the legality of his deportation order by habeas corpus, even though Congress had "preclud[ed] judicial interven-

"the answer must plainly be in the affirmative" because "elimination of all judicial review of executive detention violates the Constitution." App. 19a.

Having decided that the Constitution required that at least some avenue of judicial review remain available to respondent, the court of appeals then considered what the scope of such review must be. App. 19a. It noted that this would be a "thorny problem" if Congress had repealed 28 U.S.C. 2241, because then the court would be required to define the contours of a "free standing" constitutional writ of habeas corpus. App. 20a. "Fortunately," the court stated, "we are not confronted with that circumstance," because neither AEDPA nor IIRIRA expressly referred to 28 U.S.C. 2241, and thus it reasoned "[t]he base habeas statute, 28 U.S.C. § 2241, * * * remains." App. 20a. The court of appeals recognized that under the Ninth Circuit's binding precedent in *Hose*, Section 1252(g) "forfended access to relief under 28 U.S.C. § 2241" in immigration cases. But the court concluded that that effect of Section 1252(g) violated the Suspension Clause in this case, and so its "impediment to the general habeas remedies of 28 U.S.C. § 2241 is removed for [respondent] and those similarly situated." App. 20a-21a. "Thus, because Congress has chosen to implement the general right of habeas relief through 28 U.S.C. § 2241," the court "conclude[d] that to the extent habeas remedies in immigration cases are protected by the Suspension Clause, relief is afforded through the statutory remedy of 28 U.S.C. § 2241." App. 21a.[7]

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tion in deportation cases except insofar as it was required by the Constitution." App. 15a-16a.

[7] The court found its conclusion to be consistent with "the requirement that judicial review of constitutional claims not be foreclosed." App. 21a (citing *Webster* v. *Doe*, 486 U.S. 592, 603

The court of appeals then held that both claims raised by respondent fell within the scope of 28 U.S.C. 2241. On that ground alone, it held that both claims could be heard by the district court in habeas corpus proceedings, without analyzing whether the Suspension Clause *required* that result for either claim. In the court's view, respondent "has made a colorable argument that his deportation would violate the Equal Protection and Due Process Clauses, and that his deportation is forbidden by United States statute." App. 22a. The court found these claims to be distinguishable from challenges to purely discretionary decisions, "which some courts have held [fall] outside the scope of section 2241." *Ibid.* (citing *Ter Yang* v. *INS*, 109 F.3d 1185, 1195 (7th Cir.), cert. denied, 118 S. Ct. 624 (1997)).[8] Accordingly, the court remanded respondent's constitutional and statutory claims to the district court for further proceedings on the merits. App. 24a.

REASONS FOR GRANTING THE PETITION

The court of appeals held that 8 U.S.C. 1252(g) (Supp. II 1996) violates the Suspension of Habeas Corpus

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(1988)). The court believed that, as construed in *Hose*, Section 1252(g) would prevent respondent "from presenting his constitutional claims before any tribunal, administrative or judicial." App. 21a.

[8] The court rejected the INS' argument that, even if review could be had under 28 U.S.C. 2241, the habeas petition should be heard and decided by the court of appeals rather than the district court. App. 23a-24a. The court acknowledged concerns about "a bifurcated system of review," but it suggested that such "bifurcated review of immigration matters has been the norm, not the exception." App. 23a. Moreover, the court stated, the district court's fact-finding capabilities were superior to those of the court of appeals, and respondent's petition "raises factual questions which are best committed to the wisdom of the district court for resolution." App. 23a-24a.

Clause because, the court believed, that provision eliminates all judicial review for essentially all challenges that criminal aliens such as respondent might seek to make to their deportation orders. The decision by a lower court that an Act of Congress is unconstitutional, by itself, warrants this Court's review. See *United States* v. *Edge Broadcasting Co.*, 509 U.S. 418, 425 (1993). Moreover, this case presents particularly compelling circumstances for review: the decision rests on a potentially far-reaching misreading of the immigration statutes before the court that needlessly placed those statutes in constitutional doubt; it mandates circumvention of the statutory scheme that was specifically designed by Congress to channel all judicial review of deportation matters to the courts of appeals; it frustrates Congress's clear intent that deportation proceedings specifically for criminal aliens (including judicial review thereof) be streamlined; it affects a large number of pending and future proceedings involving criminal aliens; and it touches on the federal government's power over immigration, a matter traditionally reserved for the judgment of the political Branches. This case also raises issues closely related to those presented in *Goncalves* v. *Reno*, 144 F.3d 110 (1st Cir. 1998), in which we are simultaneously fiiing a petition for a writ of certiorari.

1. Certiorari is warranted in this case to review "the exercise of the grave power of annulling an Act of Congress." *United States* v. *Gainey*, 380 U.S. 63, 65 (1965). The nature of the statutory scheme declared unconstitutional imbues this case with particular significance, for it touches on powers uniquely within the plenary authority of Congress under the Constitution. Congress's specification of the manner and extent to which orders of deportation are subject to judicial re-

view implicates its authority over immigration matters generally, a subject concerning the Nation's sovereignty. "[T]he responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government," and "[o]ver no conceivable subject is the legislative power of Congress more complete." *Reno* v. *Flores*, 507 U.S. 292, 305 (1993) (internal quotation marks omitted).

In addition, the statutes at issue here implicate Congress's power to "constitute Tribunals inferior to the supreme Court." U.S. Const. Art. I, § 8, Cl. 9; see also Art. III, § 1 ("Congress may from time to time ordain and establish" inferior federal courts). "Congress has the constitutional authority to define the jurisdiction of the lower federal courts," *Keene Corp.* v. *United States*, 508 U.S. 200, 207 (1993), and once it has defined that jurisdiction, the limits it has established "must be neither disregarded nor evaded." *Owen Equipment & Erection Co.* v. *Kroger*, 437 U.S. 365, 374 (1978).

2. The court of appeals' constitutional ruling rests on a misreading of Section 309(c)(4)(G) of IIRIRA that creates needless constitutional doubt.[9] Section

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[9] As we have explained above (see p. 6, *supra*), Section 309(c)(4)(G) of IIRIRA supplements and reinforces the amendment made to 8 U.S.C. 1105a(a)(10) by Section 440(a) of AEDPA, which provides that a deportation order entered against an alien who is deportable by reason of having committed a criminal offense falling in any of several categories "shall not be subject to review by any court." 110 Stat. 1276-1277. Although AEDPA Section 440(a) and IIRIRA Section 309(c)(4)(G) apply only to immigration proceedings commenced before April 1, 1997, their permanent replacement, 8 U.S.C. 1252(a)(2)(C) (Supp. II 1996), is substantively identical. Thus, courts in the future are likely to construe Section 1252(a)(2)(C) in light of the courts of appeals' construction of its predecessor provisions, just as the courts of appeals have issued

309(c)(4)(G) provides that "there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed" certain criminal offenses, including respondent's offense. The court of appeals read that language as eliminating review of *all* claims by criminal aliens such as respondent, even challenges to the constitutionality of a provision of the INA itself.[10] Section 309(c)(4)(G), however, did not eliminate all review of all possible challenges by criminal aliens to their deportation orders. For example, as the court of appeals acknowledged in this case (App. 7a), Section 309(c)(4)(G), like Section 440(a) of AEDPA,

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conforming constructions of AEDPA Section 440(a) and IIRIRA Section 309(c)(4)(G). See App. 7a-8a (relying on *Ter Yang* v. *INS*, 109 F.3d 1185, 1192 (7th Cir.), cert. denied, 118 S. Ct. 624 (1997), and *Duldulao* v. *INS*, 90 F.3d 396 (9th Cir. 1996)); see also *Goncalves* v. *Reno*, 144 F.3d 110, 116-117 (1st Cir. 1998) (similarly relying on *Kolster* v. *INS*, 101 F.3d 785 (1st Cir. 1996), and *Santos* v. *INS*, 124 F.3d 64 (1st Cir. 1997)), petition for cert. pending (filed Nov. 18, 1998).

[10] The court of appeals suggested (App. 17a) that this construction was required by its previous decision in *Hose*, which it read as holding that "all forms of judicial review in immigration cases" are eliminated in cases like this one. The court misread *Hose*, which held only that a non-criminal alien who could file a petition for review of her deportation order in the court of appeals could not, because of Section 1252(g), proceed in district court under the district court's habeas jurisdiction. See 141 F.3d at 934-935. *Hose* did not address the scope of jurisdiction that a court of appeals might retain over petitions for review filed by criminal aliens, even after enactment of AEDPA and IIRIRA. The court also overlooked language in *Hose* stating that "Section 1252 gives this court jurisdiction to hear those claims by way of a petition for review of a final order of removal." *Id.* at 935. The alien has filed a petition for rehearing in *Hose*, which is still pending. The government informed the court of appeals, in response to that petition for rehearing, that it intended to file a petition for a writ of certiorari in this case.

permits a court of appeals to entertain a petition for review to the extent the petitioner contends that he does not fall within the category of aliens for whom judicial review is precluded—*e.g.*, to review a contention that the petitioner is not an alien, that he was not convicted of the offense on which his deportation was based, or that that offense is not one for which judicial review is barred. That is so because the court of appeals has jurisdiction to determine its own jurisdiction, *i.e.*, to conclude whether respondent actually falls within the class of aliens for whom judicial review is precluded. See also *Ter Yang* v. *INS*, 109 F.3d at 1192; *Coronado-Durazo* v. *INS*, 123 F.3d 1322 (9th Cir. 1997) (petition for rehearing pending); but see *Berehe* v. *INS*, 114 F.3d 159, 161 (10th Cir. 1997) (concluding that Section 309(c)(4)(G) does not permit review of deportability).

Similarly, in our view, neither Section 440(a) of AEDPA nor Section 309(c)(4)(G) of IIRIRA withdrew from the courts of appeals their established authority to consider constitutional challenges to a provision of the INA itself—challenges that the BIA has no authority to adjudicate. Compare *Johnson* v. *Robison*, 415 U.S. 361, 373-374 (1974). See, *e.g.*, *INS* v. *Chadha*, 462 U.S. 919, 938-939 (1983) (holding that the court of appeals could entertain a constitutional challenge to a statutory legislative veto provision affecting a deportation order); see also *Francis* v. *INS*, 532 F.2d 268, 273 (2d Cir. 1976) (holding that Section 1182(c) violates equal protection insofar as it is made available to only some deportable aliens and not others similarly situated); *Perez-Oropeza* v. *INS*, 56 F.3d 43, 45-46 (9th Cir. 1995) (no equal protection violation in limiting eligibility for waiver of deportation); *Raya-Ledesma* v. *INS*, 42 F.3d 1263, 1265 (9th Cir. 1994) (no equal protection violation regarding

seven-year requirement for Section 1182(c) relief).[11] Thus, while there is no doubt that Section 440(a) of AEDPA and Section 309(c)(4)(G) of IIRIRA were intended to place significant restrictions on the courts of appeals' authority to review the merits of deportation orders entered against criminal aliens, a criminal alien may, as before, raise a constitutional challenge to a provision of the INA. The court of appeals therefore erred in construing Section 309(c)(4)(G) as precluding review of respondent's constitutional challenge to 8 U.S.C. 1182(c), as amended by Section 440(d) of AEDPA, to exclude from eligibility certain criminal aliens in deportation but not in exclusion proceedings.[12]

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[11] This case does not require the Court to consider whether courts of appeals may adjudicate any other constitutional claims by criminal aliens on petitions for review, notwithstanding the preclusions of review in AEDPA and IIRIRA. Cf. *Webster* v. *Doe*, 486 U.S. 592, 603 (1988).

[12] The court of appeals suggested (App. 23a) that respondent's petition "raises factual questions which are best committed to the wisdom of the district court for resolution." We do not agree that respondent's challenge to the constitutionality of Section 1182(c) (or his challenge to the Attorney General's interpretation of it) requires factual determinations; but even if we assume otherwise, the mechanism established by Congress, channeling all review to the court of appeals, nonetheless presents no constitutional difficulty. As we explain in our brief (at 44-49) and reply brief (at 12-17) in *Reno* v. *American-Arab Anti-Discrimination Committee*, No. 97-1252 (argued Nov. 4, 1998), under the Hobbs Administrative Orders Review Act, 28 U.S.C. 2341-2351, which governs review of deportation orders in the courts of appeals, see 8 U.S.C. 1105a(a) (1994; repealed 1996); 8 U.S.C. 1252(a)(1) (Supp. II 1996), the court of appeals may transfer the proceedings to a district court for fact-finding whenever a genuine issue of material fact is presented. 28 U.S.C. 2347(b)(3). Thus, there is an adequate judicial mechanism to make any factual determinations that might be required for resolution of any substantial constitutional claim by a criminal alien that may be presented in a petition for review.

Because judicial review of a criminal alien's constitutional challenge to Section 1182(c) is available in the court of appeals on petition for review, the court of appeals' constitutional concerns about the suspension of the writ of habeas corpus are without substance. Even though the traditional writ of habeas corpus is no longer available for review of deportation orders, including those entered against criminal aliens like respondent, the alternative remedy supplied by Congress is adequate for the consideration of respondent's constitutional claim. See *Swain* v. *Pressley*, 430 U.S. 372, 381 (1977) (Congress may substitute alternative review procedures in place of habeas corpus).

Section 440(a) of AEDPA and Section 309(c)(4)(G) of IIRIRA do not, however, permit the court of appeals to consider the particular non-constitutional claim made by respondent here—namely, that the Attorney General erroneously interpreted Section 440(d) of AEDPA in concluding that the amendment it made to Section 1182(c) rendered him ineligible for discretionary relief from deportation. Nor could that claim be presented to the district court, for Section 1252(g) has withdrawn the district court's authority to hear such claims as well. But that particular claim also does not fall within whatever scope of the habeas corpus remedy is preserved by the Suspension of Habeas Corpus Clause. Even if (as we assume for present purposes) the Clause does require a mechanism of judicial review of some non-constitutional issues, respondent's claim is not among the ones for which judicial review must be preserved. Respondent does not contend that his deportation would be *ultra vires*; thus, he does not argue that he is not an alien, that he was not convicted of the criminal offense on which his deportation is based, or that he has been held to be deportable for having been

convicted of an offense that does not actually render him deportable under the INA. Indeed, respondent conceded his deportability. Rather, he argues that the Attorney General has erred in finding him to be ineligible for discretionary relief from a concededly proper deportation.[13]

This Court has never held that such a claim of error is within the constitutional core of the Great Writ that must be preserved under the Suspension of Habeas Corpus Clause. To the contrary, the Court has described the Attorney General's discretionary power to grant a dispensation from deportation as an "act of grace" which is accorded pursuant to her "unfettered discretion," similar to "a judge's power to suspend the execution of a sentence, or the President's to pardon a convict." See *INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996) (quoting *Jay* v. *Boyd*, 351 U.S. 345, 354 (1956)). Although Congress could subject the Attorney General's decisions relating to the exercise of that discretion—including her eligibility decisions—to judicial review, and has done so in the past, it eliminated such review in AEDPA and IIRIRA. The court of appeals therefore erred in concluding that the Suspension of Habeas Corpus Clause would be violated if respondent is not afforded a judicial forum for review of that claim.

3. The result of the Ninth Circuit's decision in this case is that criminal aliens—but only criminal aliens—may proceed in district court under 28 U.S.C. 2241 to test the validity of their deportation orders, whereas all other aliens must file petitions for review in the court of appeals. Cf. *Hose*, 141 F.3d at 935 (holding that non-

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[13] Respondent does not even contend that the Attorney General could not permissibly exercise her discretion to deny him relief from deportation under Section 1182(c) if he were not statutorily barred from eligibility for that relief.

criminal alien must file in court of appeals directly). That result not only frustrates Congress's intent that review of criminal aliens' deportation proceedings be streamlined and limited; it turns Congress's scheme on its head. It is scarcely conceivable that Congress would have intended criminal aliens to have *greater* opportunities for judicial review (and delay) of their deportation orders than all other aliens. See *Foti* v. *INS*, 375 U.S. 217, 224 (1963) (noting that "[t]he fundamental purpose behind [placing exclusive review in the courts of appeals] was to abbreviate the process of judicial review of deportation orders in order to frustrate certain practices which had come to the attention of Congress, whereby persons subject to deportation were forestalling departure by dilatory tactics in the courts"); see also *Stone* v. *INS*, 514 U.S. 386, 399 (1995).

Under the general review provisions of the INA, an alien challenging his deportation order must file a petition for review in the court of appeals, within 30 (previously 90) days after issuance of the final order of removal. See 8 U.S.C. 1252(b)(1) (Supp. II 1996); 8 U.S.C. 1105a(a)(1) (1994; repealed 1996). Further, the court of appeals is directed to consolidate the petition for review of the deportation order with any petition for review of the denial of any motion to reopen or reconsider the deportation order. See 8 U.S.C. 1252(b)(6) (Supp. II 1996). Such motions have been frequently filed by aliens and, in the past, have frequently led to delays in deporting them. See *Stone* v. *INS*, 514 U.S. at 399-400. And of course, any decision by the court of appeals is final, subject only to further review in this Court.

Aliens proceeding in district court under 28 U.S.C. 2241 would have markedly greater opportunities for delay than those proceeding in the court of appeals.

First, 28 U.S.C. 2241 contains no express time limit on the filing of a petition for a writ of habeas corpus. Thus, an alien could delay his deportation by withholding the filing for habeas corpus until his deportation warrant was executed and his departure was imminent. Second, 28 U.S.C. 2241 does not require consolidation of challenges to deportation orders with challenges to motions to reopen or reconsider. Third, an alien who was unsuccessful in district court could appeal to the court of appeals, and thereafter seek review in this Court. Inevitably, therefore, permitting criminal aliens to proceed in district court under 28 U.S.C. 2241 would make the entire process of judicial review of those aliens' deportation orders longer than the process of reviewing non-criminal aliens' deportation orders.

That unlikely result demonstrates why Congress could not have intended criminal aliens to retain access to district courts under 28 U.S.C. 2241. The most harmonious reading of IIRIRA is that Congress intended all claims for which the INA allows judicial review (or the Constitution requires it) to be presented to the court of appeals, on petition for review. As we have explained, Section 440(a) of AEDPA and Section 309(c)(4)(G) of IIRIRA allow for judicial review of the fundamental statutory issues concerning the deportability of a criminal alien, and 8 U.S.C. 1252(b)(9) (Supp. II 1996) makes clear that any constitutional challenges an alien may make to his removal are to be consolidated with statutory challenges. The court of appeals recognized that its holding created a "bifurcated system of review," but it believed that "bifurcated review of immigration matters has been the norm, not the exception." App. 22a. That statement rests on a serious misunderstanding of the history of the Nation's immigration laws, as well as the effect of Congress's

amendments to the INA in 1961. More fundamentally for present purposes, however, it is directly contrary to Congress's determination in AEDPA and IIRIRA to eliminate any remaining traces of bifurcated review.[14]

Finally, although we do not believe that a judicial forum is required for the particular non-constitutional claim raised by respondent in this case, at a minimum the court of appeals should have held that that claim could be addressed only in the court of appeals on petition for review, and not in the district court on habeas corpus proceedings. Such a construction of

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[14] Former Section 1105a, requiring review of deportation orders in the courts of appeals, was added to the INA precisely because Congress was dissatisfied with the bifurcated system of review that resulted from this Court's decision in *Shaughnessy* v. *Pedreiro*, 349 U.S. 48 (1955), permitting aliens to proceed in district court. See H.R. Rep. No. 1086, 87th Cong., 1st Sess. 22, 27-28 (1961); *Foti*, 375 U.S. at 225. Congress did in 1961 preserve a limited role for the district court to issue writs of habeas corpus in the deportation context, but only for aliens held in custody. See 8 U.S.C. 1105a(a)(10) (1994). And, as we have explained (p. 4, *supra*), Congress repealed that habeas corpus provision of Section 1105a in 1996.

The court of appeals erroneously relied on *Cheng Fan Kwok* v. *INS*, 392 U.S. 206, 216 (1968), for the conclusion that bifurcated review is commonplace in immigration matters. *Cheng Fan Kwok*, however, concerned the alien's opportunity to seek judicial review of an issue that is separate from and not merged into his deportation order, namely, the denial of a stay of deportation by an INS District Director. As the Court explained in *Cheng Fan Kwok*, such matters were *not* governed by former Section 1105a, which placed review of deportation orders in the courts of appeals. That decision has no relevance to the matter at issue here, a challenge to a deportation order itself; Congress has made it clear that the proper forum for such challenges is the court of appeals. See also *Crown Simpson Pulp Co.* v. *Costle*, 445 U.S. 193, 196-197 (1980) (bifurcated schemes of judicial review of agency action are disfavored).

Section 309(c)(4)(G) would be far more harmonious with Congress's general design in IIRIRA than is the result reached by the court of appeals. Cf. *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 631-632 (1973) ("It is well established that our task in interpreting separate provisions of a single Act is to give the Act the most harmonious, comprehensive meaning possible in light of the legislative policy and purpose.") (internal quotation marks omitted).

4. The importance of this case is underscored by the large number of aliens nationwide who are in a situation similar to respondent's. Approximately 466 petitions for review have been filed in the courts of appeals and 376 petitions for a writ of habeas corpus have been filed in the district courts in which criminal aliens have challenged the BIA's denial of Section 1182(c) relief to them based on the application of Section 440(d) of AEDPA. There are also about 2600 administrative cases still pending in which the issue of the temporal scope of Section 440(d) may be dispositive of the alien's deportation proceeding, and about 5400 others in which the BIA has dismissed an alien's appeal based on *Soriano* (and which the aliens might now seek to challenge by filing a habeas corpus petition). In addition, there are currently at least 23,000 removable aliens held in federal prisons and 54,000 removable aliens incarcerated in state prisons. Once those aliens are placed in removal proceedings, many of them may claim, as respondent has claimed in this case, that neither AEDPA nor IIRIRA is applicable to their case because their convictions were entered before the effective date of AEDPA, and so their eligibility for Section 1182(c) relief should be judged under pre-AEDPA law. And they may seek to raise that and other claims by filing a habeas corpus petition in district court. The

impact of the decision below threatens to be especially severe, because close to one-half of all immigration cases traditionally arise in the Ninth Circuit.[15]

We also note that even aliens convicted in the future of criminal offenses and deportable on that ground may be affected by this case. Such criminal aliens who are ineligible for cancellation of removal under 8 U.S.C. 1229b (Supp. II 1996) may nonetheless seek to raise constitutional and statutory challenges to their orders of removal. Because, as we have explained (note 9, *supra*), courts are likely to construe the jurisdiction-limiting provisions applicable to criminal aliens in new Section 1252(a)(2)(C) in conformity with judicial constructions of Section 309(c)(4)(G) of IIRIRA and Section 440(a) of AEDPA, it is likely that criminal aliens in the future, if allowed to do so, will proceed in district court under Section 2241 rather than the court of appeals.

Further, other courts of appeals have agreed with the court below that criminal aliens may *not* challenge the denial of Section 1182(c) relief on any ground in a petition for review in the court of appeals, but that they may raise both constitutional and statutory challenges in a petition for a writ of habeas corpus in district court under 28 U.S.C. 2241. See *Goncalves* v. *Reno*, 144 F.3d 110 (1st Cir. 1998), petition for cert. pending (filed Nov. 18, 1998); *Henderson* v. *INS*, 157 F.3d 106 (2d Cir. 1998); see also *Lerma de Garcia* v. *INS*, 141 F.3d 215, 217 (5th Cir. 1998) (dismissing petition for review for lack of jurisdiction, but reaffirming that "criminal

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[15] Of the approximately 460 petitions for review that have been filed by criminal aliens in which the temporal application of Section 440(d) is at issue, 242 have been filed in the Ninth Circuit. About 30 petitions for a writ of habeas corpus raising the Section 440(d) issue have been filed in district courts in the Ninth Circuit.

deportees retain some opportunity to apply for writs of habeas corpus"); *Mansour* v. *INS*, 123 F.3d 423, 426 (6th Cir. 1997) (similar). Although the *Goncalves* and *Henderson* courts did not frame their rulings in constitutional terms, as did the court below, their conclusions that district court proceedings under 28 U.S.C. 2241 remain open to criminal aliens were strongly influenced by the perceived possibility of a constitutional violation should they have reached a contrary conclusion. The Seventh Circuit, however, has disagreed with the proposition that aliens may proceed under Section 2241, and has suggested that Congress repealed the applicability of Section 2241 in immigration cases entirely—with the result that, to the extent that judicial review is constitutionally required, such review must be provided under the "free standing" constitutional writ of habeas corpus. See *Ter Yang* v. *INS*, 109 F.3d at 1195; but see *Turkhan* v. *INS*, 123 F.3d 487, 490 (7th Cir. 1997) (apparently suggesting that review may remain available under Section 2241). This divergence of views among the courts of appeals about such an important subject warrants this Court's review.

5. For the reasons given above and in our certiorari petition in *Reno* v. *Goncalves*, which we are filing simultaneously with the petition in this case, the question whether district courts may review deportation orders in habeas corpus proceedings under 28 U.S.C. 2241 is of substantial and recurring importance in the administration of the immigration laws. Review of that issue by this Court therefore is warranted.

On November 4, 1998, this Court heard argument in *Reno* v. *American-Arab Anti-Discrimination Committee* (*AADC*), No. 97-1252, which involves related questions concerning whether the district courts retain any jurisdiction to review deportation matters after

AEDPA and IIRIRA, and specifically concerns the scope of 8 U.S.C. 1252(g) (Supp. II 1996). As we explain in our petition in *Goncalves* (at 28-29), however, *AADC* does not specifically involve the continued availability of the writ of habeas corpus or any question arising under the Suspension of Habeas Corpus Clause. As we further explain in our petition in *Goncalves* (at 29), a decision by this Court resolving that question is necessary this Term because of the widespread and disruptive litigation in the lower courts on that question (and on the underlying issues concerning the availability of relief to criminal aliens under Section 1182(c)). We therefore suggest that the Court not hold the petitions in *Goncalves* and this case pending its decision in *AADC*.

If the Court were to grant review in only one of these two cases, we suggest that it grant review in *Goncalves* and hold the petition in this case. The First Circuit in *Goncalves*, after deciding that the district court had habeas corpus jurisdiction under 28 U.S.C. 2241, went on to hold on the merits that the amendment made to Section 1182(c) by Section 440(d) of AEDPA should not be applied "retroactively" to aliens who filed applications for relief prior to AEDPA's enactment. That rejection of the Attorney General's considered judgment independently warrants this Court's review, if the Court rejects our submission that no court (including a district court in habeas corpus proceedings under 28 U.S.C. 2241) has jurisdiction to consider the issue.

We urge, however, that the Court grant review in this case as well as in *Goncalves*. The Ninth Circuit in this case held a provision of the INA (8 U.S.C. 1252 (Supp. II 1996)) unconstitutional. Moreover, the decision of the Ninth Circuit was rendered in two cases that were consolidated in that court: respondent's direct

petition for review of his deportation order in that court, and his appeal from the district court's dismissal of his petition for a writ of habeas corpus. Review of the Ninth Circuit's decision in this case along with the First Circuit's decision in *Goncalves* therefore would allow this Court to render a definitive holding regarding the jurisdiction of *both* the courts of appeals *and* the district courts in cases like these, while preserving the Court's ability to resolve the temporal scope of Section 440(d) of AEDPA if it concludes that the district court in *Goncalves* did have jurisdiction to consider that issue in habeas corpus proceedings.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1998